

To: Simshauser, Peter[Peter.Simshauser@skadden.com]
From: Fajardo, Juan
Sent: Mon 5/1/2017 11:46:53 AM
Subject: RE: Lower Passaic River

Peter –

Yes, EPA is moving forward with negotiations regarding the early cash out settlement offers, and yes, we expect to turn our full attention to identifying the “Majors” thereafter, although we are currently working on identifying the Majors. We hope to have completed our review of the information we have regarding the lower 8.3 miles by the end of the fiscal year, which is what we need to do in order to identify parties connected to dioxins, furans and PCBs.

While a final decision hasn’t been made, our current thinking is to notify parties that EPA believes have a connection with dioxins, furans and PCBs and provide those parties with an opportunity to have a discuss with EPA prior to EPA identifying the Major parties. The parties notified by EPA as PRPs for the lower 8.3 miles likely have the information EPA has. If a party requests information from EPA, EPA will provide such information to the requestor subject to any appropriate confidential/privilege exemption.

At this time, EPA has not identified the Major parties. I do not know if 21st Century Fox will be identified as a Major party or a “Middle Tier” party. It is EPA’s expectation to have a 3rd party allocator and for the Middle Tier parties to participate in an allocation process. The allocator will submit recommendations to EPA regarding the Middle Tier parties. EPA does expect to make further cash out offers with respect to the lower 8.3 miles.

I will do my best to keep you informed as we move forward, however, you should feel free to contact if you need further information regarding these matters.

Sincerely,

Juan M. Fajardo

Assistant Regional Counsel

212 637-3132

From: Simshauser, Peter [mailto:Peter.Simshauser@skadden.com]
Sent: Friday, April 28, 2017 6:05 AM
To: Fajardo, Juan <Fajardo.Juan@epa.gov>
Subject: RE: Lower Passaic River

Juan,

Thank you for reaching out to speak earlier this week about EPA's request that I withdraw my pending FOIA request, which I submitted on behalf of 21CFA.

My understanding of our discussion –please correct me if I'm mistaken – is that: (i) EPA's current intention is to move forward with the initial cash-out process that it initiated in March; (ii) afterwards to then devote attention to identifying parties it believes responsible for releasing or discharging dioxins, furans or PCBs into the Lower Passaic River; (iii) regarding (ii), EPA's aspiration is to make its initial determination of such parties by September 30, 2017, and to then notify each such party and provide it the opportunity to submit documents to EPA and to meet with EPA, for the purpose of seeking to demonstrate that the party is not responsible for releasing or discharging dioxins, furans and/or PCBs into the river; (iv) in connection with (iii), EPA would provide each party with the documents on which EPA based its initial determination such that a party could review and respond to the documents in its written submission and/or meeting with EPA.

You noted that 21CFA may not be included in EPA's initial designation of parties considered responsible for the release or discharge of dioxins, furans or PCBs into the river. That would be the correct course, because 21CFA and its predecessors did not release or discharge dioxins, furans or PCBs into the river. EPA has said that it intends to initiate an allocation process among the parties not designated as having released or discharged of dioxins, furans or PCBs into the river, and to enable them to participate in a second cash-out settlement. 21CFA should be part of that process.

If my understanding as stated in the first paragraph above is correct, and if you can confirm that if EPA's intentions change materially you will advise me such that I can propound a FOIA request consistent with 21CFA's need to be able to see and meaningfully respond to any evidence that might contribute to a possible decision by EPA related to 21CFA (initial or otherwise), then as you've requested I will withdraw the presently pending FOIA request. In withdrawing the request, 21CFA will reserve its rights to argue that EPA's process violates 21CFA's legal rights. 21CFA continues to request a meeting with EPA before any determination is made, initial or otherwise, regarding it; we understand that EPA will not agree to such a meeting.

I look forward to hearing from you.

Best regards,

Peter

From: Simshauser, Peter (BOS)
Sent: Thursday, April 20, 2017 9:53 AM
To: 'fajardo.juan@epa.gov'
Subject: RE: Lower Passaic River

Juan,

I am sorry that I missed your call yesterday and was unable to return it. I have meetings today but am more open tomorrow. Let's speak at a convenient time after you have an opportunity to review the below.

Following up on our discussion last week, I've confirmed with 21st Century Fox America, Inc. (21CFA) that it does not want its pending FOIA request to unnecessarily inconvenience you or others at EPA. As discussed, we do want to ensure that we receive a meaningful response to the FOIA request at a future time. From 21CFA's perspective, that time could be one that both (1) enables EPA to gather in due course the documents that it will be reviewing relative to 21CFA in connection with EPA's process for making the determination described in Eric Wilson's March

30 letter (i.e., designating some PRPs as "responsible for the release or discharge of dioxins, furans, or polychlorinated biphenyls" and encouraging them to "participate in implementing or funding the remedy selected for the lower 8.3 miles of the Lower Passaic River," and designating other PRPs for participation in a possible "cash out settlement" process); and (2) enables 21CFA, after receiving these documents, a reasonable opportunity to submit to EPA any responsive information it wishes the agency to consider before EPA makes the above determination. As noted, 21CFA unquestionably should be designated to participate in the cash out settlement process. As acknowledged by NJDEP, which is overseeing the cleanup of the property that 21CFA's predecessor formerly owned in Newark (100 Lister Avenue), the property is not contaminated by dioxins, furans or PCBs; moreover, it is not and was not a source of them to the river.

In the somewhat comparable context of a request to produce documents in litigation, we could agree that the date for EPA to produce documents would be extended, and that we would confer in coming weeks or months about an agreed response date consistent with above. I have not yet researched whether a similar arrangement is possible in the context of a FOIA request. Can you please advise me of your understanding in that regard? Of course, if you do not believe that the above approach is agreeable, please advise.

Also, I want to renew 21CFA's request, which I conveyed when we spoke last week, that EPA meet with 21CFA's expert consultants prior to making the above-described determination, and not merely after doing so. We believe that such a meeting, to discuss the contents of a written presentation that we will be submitting to EPA in coming weeks (well before EPA makes the determination), would be productive and is required by constitutional and statutory principles.

My understanding is that EPA's position is that it will not meet with 21CFA before making the determination; we hope that EPA will reconsider.

I look forward to speaking with you soon.

Best regards,

Peter

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From: Simshauser, Peter (BOS)
Sent: Tuesday, April 04, 2017 3:35 PM
To: 'Flanagan.Sarah@epa.gov'; 'fajardo.juan@epa.gov'
Subject: Lower Passaic River

Sarah and Juan,

Please see the attached correspondence.

Thanks,

Peter

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